No. 6352.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Ward Daniels, Claimant of the Gas Screw Vessel Rethaluleu,
Appellant.

vs.

United States of America,
Appellee.

BRIEF OF APPELLEE.

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STATEMENT OF THE CASE.

Claimant herein has been twice ruled against in the lower courts. The matter was presented to a Commissioner and thereafter, upon exceptions, to the United States District Court. Both courts announced in favor of the Libelant.

Libelant, on April 22, 1929, filed its libel of information against the Triple Gas Screw Motor Boat Rethaluleu, official number 227860, alleging violations of sections 4377 R. S. (Title 46 U. S. C. A., section 325) and 4189 R. S. (Title 46 U. S. C. A. section 60).

After joinder of issue counsel for the Libelant and counsel for the Respondent and Claimant entered into a written stipulation [Tr. 21].

> "IT IS HEREBY STIPULATED by and between Samuel W. McNabb, United States Attorney for the Southern District of California, and Emmett E. Doherty, Assistant United States Attorney for said District, Proctors for the Libelant, and Otto Christensen, Proctor for Respondent, that an order be entered by the Court referring the trial of this cause to David B. Head, Commissioner, and that the said Commissioner shall have authority to take testimony, to continue the trial from day to day, to make findings of fact and make a report therein.
>
> "IT IS FURTHER STIPULATED that the Commissioner's fee for hearing this cause shall be paid by the Respondent."

and it was by the Court so ordered.

Thereafter Libelant amended the libel by adding three additional causes of action.

On May 27, 1930, the cause came on for hearing before the Commissioner pursuant to the stipulation and order of Referee.

Libelant at the hearing introduced evidence on all of the causes of action pleaded but because the Commissioner and the Court, upon review, held that the Rethaluleu was forfeited by reason of the violation of Title 46 U. S. C. A., section 325 (4377 R. S.), and Title 46 U. S. C. A., section 60 (4189 R. S.), as pleaded in the original libel, it is only necessary in this argument to refer to the two statutes.

Title 46, U. S. C. A., section 325 (4377 R. S.) reads as follows:

> "Penalty for violation of license. Whenever any licensed vessel is transferred, in whole or in part, to any person who is not at the time of such transfer a citizen of and resident within the United States, or is employed in any other trade than that for which she is licensed, or is found with a forged or altered license, or one granted for any other vessel, such vessel with her tackle, apparel, and furniture, and the cargo, found on board her, shall be forfeited. But vessels which may be licensed for the mackerel fishery shall not incur such forfeiture by engaging in catching cod or fish of any other description whatever."

Title 46 U. S. C. A., section 60 (4189 R. S.) reads as follows:

> "Penalty for fraudulent registry. Whenever any certificate of registry, enrollment, or license, or other record or document granted in lieu thereof, to any vessel, is knowingly and fraudulently obtained or used for any vessel not entitled to the benefit thereof, such vessel, with her tackle, apparel, and furniture, shall be liable to forfeiture."

The Commissioner found that the Rethaluleu is a vessel of sixteen tons, powered with three Liberty motors, but because the remaining findings of fact and the conclusions of law have been set forth in full at pages 375 to 378 of the transcript, the record will not be further burdened by reiterating them.

Claimant filed exceptions to the report of the Commissioner, and they were presented to the Court and argued. On September 19, 1930, at Los Angeles, California, the Court overruled the exceptions and caused its minute order to be entered as set out at page 383 of the transcript, pages 6 and 7 of Appellant's brief.

At that time Honorable Paul J. McCormick, United States district judge, filed in writing his conclusions. After formally overruling and denying the exceptions and confirming the report and adopting its recommendations and ordering a decree of forfeiture, His Honor proceeded to state [Tr. 384]:

> "In amplification of the ruling confirming the Commissioner's report herein, it is sufficient to state that an examination of the evidence before the Commissioner reveals that assuming that the Commissioner erred in excluding proffered evidence as to the whereabouts of the speed boats, 'A-1817' and 'The Seal,' it was shown by sufficient and satisfactory evidence that the 'Rethaluleu' on and about September 30, 1928, engaged in a trade other than that for which she was registered and that said vessel was fraudulently registered. Such conclusion is supported not solely by the depositions of Kruger and Johnson, but is clearly inferable and proven by other independent facts and circumstances in the record. But it is not clear that the Commissioner erred in excluding the proffered evidence. The Commissioner ruled that the proffered matter was collateral to the issue before him and that at best the matter was offered as impeachment of the witnesses Kruger and Johnson, and being impeachment upon collateral matters, it was irrelevant and immaterial to the issue as to the "Rethaluleu." There is considerable strength in this position. But assuming error, it was not substantial or prejudicial because even if taken as refutation of the testimony of Johnson and Kruger as to any contact by 'The Seal' or 'A-1817' during July, August and until the middle of September, other independent and undisturbed evidence that the 'Rethaluleu' contacted with the 'Przemsyl' in the latter part of September, 1930, amply sustains the Commissioner's ruling that the libeled vessel was engaged in a trade for which she was not registered. The exceptions to the master's report are overruled, the report is confirmed, and a

decree in accordance therewith is ordered with costs to libelant."

The minute order of September 19, 1930, and the conclusions of the Court, filed the same date, were made and filed while Honorable Paul J. McCormick was within the Southern District of California. His Honor left the Southern District of California to sit, by assignment, as a United States district judge for the Southern District of New York before Libelant presented its proposed findings of fact and conclusions of law and decree.

The findings of fact and conclusions of law were prepared by counsel for the Libelant, and presented to counsel for the Claimant for his approval. Counsel for the Claimant endorsed on the proposed findings of fact and conclusions of law certain objections which appear on pages 410 and 411 of the transcript. Claimant did not include any suggestion to the Court that he then had the opinion or would ever contend that the Court was then without the power to sign findings, make conclusions and order its decree entered. The scope of the objections which counsel for Claimant presented to the decree shows that he had given the objections consideration and it is apparent that at that time he conceded that the judge who heard and overruled the objections to the Commissioner's report and ordered a decree pursuant to the Commissioner's report then had the authority to sign findings of fact and conclusions of law and render a decree pursuant to the order of September 19, 1930.

It seems reasonable to believe that if the action to be taken by Judge McCormick, and of which Claimant's coun-

sel was well aware, would be prejudicial or if any legal cause existed why the Court should not take the action of October 6, 1930, these matters would and in good conscience, should have been included in the objections forwarded to the Court. It was not until November 1, 1930, when Claimant filed his petition for appeal, that the first suggestion was made that the Court had erred in signing its findings and decree of October 6, 1930.

It is noted that in Claimant's objections, which accompanied the proposed findings of fact and conclusions of law and the proposed decree, that Claimant complained that the proposed decree and the proposed findings were at variance and materially different from the findings of fact and conclusions of law filed by the Commissioner and that the Respondent and Claimant objected to the Court making any further findings of fact or conclusions of law other than the conclusions of the Court filed on September 19, 1930.

The report of the Commissioner and the order of the Court, confirming it, and ordering a decree pursuant thereto would doubtless be sufficient to constitute a valid judgment and decree except that on June 2, 1930, the United States Supreme Court amended the Rules of Practice in Admiralty by adding a new rule, numbered 46½, reading as follows:

> "In deciding cases of admiralty and maritime jurisdiction the Court of first instance shall find the facts specially and state separately its conclusions of law thereon; and its findings and conclusions shall be entered of record and, if appeal is taken from the decree, shall be included by the clerk in the record which is certified to the Appellate Court under Rule 49."

This new rule became effective October 1, 1930.

Prior to September 19, 1930, and after August 27, 1930, the Claimant had filed his exceptions to the Commissioner's report. These exceptions were filed with the clerk on September 2, 1930, and between September 2, 1930, and September 19, 1930, had been fully presented, argued and submitted to the Court for its ruling. After September 19, 1930, there remained nothing for the Court to do except the *pro forma* act in accordance with the newly promulgated admiralty rule. The acts of the Court of October 6, 1930, were purely ministerial. The conclusions of the Court had been entered in the Southern District of California so that nothing remained for Libelant to do but follow the order of September 19, 1930, and draft findings, conclusions and decree in accordance with the Commissioner's report. If Claimant suffered any detriment he had suffered it prior to October 6, 1930, and he did not suffer by reason of the formal action of that date.

Authority to Sign Findings and the Decree of October 6, 1930.

Claimant lays great stress upon his allegation that Honorable Paul J. McCormick, United States district judge, who made the reference and heard the exceptions to the findings of the Commissioner was without power to sign the findings and decree pursuant to his order and conclusions of September 19, 1930. In his exuberance on this point counsel falls into error. We feel that he is relying too much on newspaper accounts.

This Court will notice the public acts of the Chief Executive to the Nation and from such observation is

informed that the President of the United States, in the consideration of problems in the administration of the laws of the United States, assembled a conference of men experienced in the administration of law and named a commission known as the National Commission on Law Observance and Enforcement. He selected from the state of California Honorable Paul J. McCormick, United States district judge. The duties he assumed under this appointment were not inconsistent with the duties and responsibilities of his official position as district judge.

Counsel has declared that Judge McCormick was absent from his home district on October 6, 1930, sitting as a member of what counsel styles the "Wickersham Commission." Counsel for the Libelant knows of no such Commission. The record of the United States District Court for the Southern District of New York is the best answer to Claimant's statement. Inasmuch as Claimant deviated from the record in this case, to answer his contention, we likewise deviate and show that the circumstance which he contends to be controlling is not necessarily so. For this reason we quote in full the certified copy of the order of Chief Justice Hughes designating His Honor, Paul J. McCormick, one of the judges of the Southern District of California, to sit in the Southern District of New York from October 1, 1930, to December 31, 1930:

> "Designation of District Judge for Service in Another Circuit.
>
> The Senior Circuit Judge of the Second Circuit having certified that by reason of the accumulation and urgency of business in the District Court for the Southern District of New York in the Second Circuit, the district judges of said district are unable to per-

form speedily the work of said district, and that he (the said Senior Circuit Judge) has found it impracticable to designate and assign a sufficient number of district judges of other districts within the Second Circuit to relieve the said accumulation of urgency of business; and the Acting Senior Circuit Judge of the Ninth Circuit having consented to the designation and assignment of the Hon. Paul J. McCormick, United States District Judge for the Southern District of California in the Ninth Circuit, to hold the District Court for the Southern District of New York during the period beginning October 1st, 1930, and ending December 31st, 1930, now, therefore, pursuant to the authority vested in me by Title 28, Section 17, of the Code of Laws of the United States of America, inasmuch as in my judgment the public interest so requires,* and it appearing to be impracticable to designate and assign a district judge of a circuit adjoining the Second Circuit for such service, I do hereby designate and assign the said Hon. Paul J. McCormick to perform the duties of district judge and hold a district court in the Southern District of New York within the Second Circuit, during the period beginning October 1st, 1930, and ending December 31st, 1930, and for such further time as may be required to complete unfinished business.

CHARLES E. HUGHES
Chief Justice of the United States.

Dated, Washington, D. C., September 20th, 1930.

*This clause to be lined out where designation is from adjoining circuit.

(Seal of the District Court of the United States, Southern District of New York.)

A true copy.

CHARLES WEISER,
Clerk."

The fact is, of course, that Judge McCormick was sitting in the Southern District of New York and serving as a

member of this Honorable Commission at the same time. Neither duty prohibited him from acting herein.

If there was any merit in this contention of Claimant the question has not been properly preserved for review for we find that Rose on Federal Jurisdiction and Procedure, Third Edition, at page 347 in speaking of objections to jurisdiction says that the question may be suggested by the Court at any time during the course of the proceedings, but it must be raised in some distinct way so that the parties shall have opportunity to present evidence concerning it. If one of the parties seeks to raise the issue he must do so by some appropriate pleading.

Hartog v. Memory, 116 U. S. 588.

Scanning state court decisions on this question is of no assistance to ascertain the rule of the Federal system.

> "In legal phraseology the power of the court to hear and decide a case is termed 'jurisdiction,' * * * "
>
> 25 *Corpus Juris,* 886.

The general rule is that when the Court has jurisdiction by law of the offense charged, and of the party who is so charged, its judgments are not nullities.

The District Court had the authority to make the reference, to review the Commissioner's Report, and make its order of September 19, 1930, affirming it, and it follows that the Court thereafter had the power and authority to perform the ministerial acts of October 6, 1930, in ascertaining whether counsel for the Libelant had followed the Court's order confirming the report and drafting findings and decree in accordance with the report of the Commissioner.

In *Toland v. Sprague,* 12 Peters 300 at page 330: (37 U. S.)

> "Now, if the case were one of a want of jurisdiction in the court, it would not, according to well-established principles, be competent for the parties, by any act of theirs, to give it. But that is not the case. The court had jurisdiction over the parties and the matter in dispute; the objection was, that the party defendant, not being an inhabitant of Pennsylvania, nor found therein, personal process could not reach him; and that the process of attachment could only be properly issued against a party under circumstances which subjected him to process *in personam.* Now, this was a personal privilege or exemption, which it was competent for the party to waive. * * *
>
> "It has, however, been contended, that although this is true, as a general proposition, yet the party can avail himself of the objection to the process in this case, because it appears from the record, that a rule was obtained by him to quash the attachment, which rule was afterwards discharged; thus showing, that the party sought to avail himself of the objection below, which the court refused. In the first place, it does not appear upon the record, what was the ground of the rule; but if it did, we could not look into it here, unless the party had placed the objection upon the record, in a regular plea; upon which, had the court given judgment against him, that judgment would have been examinable here. But in the form in which it was presented in the court below, we cannot act upon it in a court of error."

A district judge who has, pursuant to the order of the circuit judge, tried a case in another district has jurisdiction to pass upon a motion for a new trial therein after returning to his home district where the parties waive his return to the other district for the purpose of deciding the motion.

Cheesman v. Hart, 42 Fed. 98.

A district judge designated, under section 17 of the Judicial Code, to hold court in an adjacent district may make an order while without such district directing the drawing of a panel of petit jurors for the order is one which may be made at the chambers of the judge and in such case

> "* * * it is not necessary that it be made within the territorial limits of the district in which the order is to be effective, if it is made where the judge at the time is performing the duties of his office, as the judge's chambers are considered to be where he is, and authorized to be, engaged in performing his judicial duties."
>
> *Apgar v. United States,* 255 Fed. 16 at page 18.

Judge Deitrich in *Hicks v. United States Shipping Board Emergency Fleet Corporation,* 14 F. (2d) 316, states:

> "In the meantime the term during which the judgment was entered, as well as the period covered by designation, expired, and I returned to my home district. Notwithstanding these facts, it would seem that under section 5 of the Act of September 14, 1922 (42 Stat. 839 (Comp. St. §985)), I have the authority to entertain the petition, and standing rule 5 of the New York district the power continues notwithstanding a lapse of the term."

We find *in re* Neagle (39 Fed. 833 at p. 839) that all of the law of the United States is not specifically expressed in statutory enactments. Many powers are necessarily inherent in the various departments of the government, without which the government could not perform functions necessary to its existence. The exercise of such power is, nevertheless, in pursuance of the laws of the United States.

We find in Hallon Parker, petitioner (131 U. S. 221) that the chambers of the district judge of Washington Territory, who is also a judge of the Supreme Court of the Territory, may be held whilst he is in attendance upon the Supreme Court at the place where such court is sitting, although it be without the territorial limits of his district, and at such chambers he may receive notice of an appeal from a judgment rendered by him within his district. At page 225 the court states:

> "When the law allowed the proceeding to be taken at the chambers of the judge of the court, it meant at the chambers where he can conveniently attend to business relating to cases in his district, not that they must necessarily be within the territorial limits of his district. As one of the judges of the Territory, it is a part of his duty to sit in the Supreme Court. He is one of its members, and his chambers, whilst the Supreme Court is in session, and he is in attendance upon it, may be at the place where that court is sitting. Otherwise the right of appeal within the six months allowed by law would be abridged for the period for which notice is to be given."

In *Wheeler v. Taft,* Fifth Circuit, reported in 261 Fed. 978, we find that a writ of error to review a judgment granted by the judge "in chambers," which is considered to be where the judge is and is authorized to be engaged in performing his judicial duties, will not be dismissed because allowed in a division other than that in which is situated the county from which the action was removed.

It is important to note that Claimant's objection is first voiced in his assignment of error XXX concurrent with his petition for appeal addressed to Honorable John R. Hazel, United States District Judge, filed November 1, 1930. Is there any merit in this assignment of error, which must be

characterized as nebulous when we find that the petition for appeal of Claimant [Tr. 393] recites that:

> "* * * feeling aggrieved by the final decree of this court entered on the 27th day of October, 1930, hereby pray that an appeal may be allowed to them * * *"

instead of appealing from the decree signed by Judge McCormick on October 6, 1930.

The authority of the Court to act outside its home district was before the Fourth Circuit *in re American Home Furnishers' Corporation, Ross et al. v. Willcox et al.* (296 Fed. 605). At page 607 the Court says:

> "The chief question here is whether the district judge had the power at chambers in Parkersburg, where he was holding court under a special assignment provided by the Judicial Code, to entertain a petition to review the action of the referee in bankruptcy in ordering a sale of the property. The general rule is that a judge has no power to try cases, either in law or in equity, outside his own district. There is at least on implication in the federal Constitution and statutes that a party cannot be required to try his cause outside the territorial jurisdiction of the court in which it is pending. The judge, however, has at chambers the authority and power to make all interlocutory orders and to do everything that is necessary to speed the cause and promote justice to the parties, except the actual trial on the merits.
>
> "Even if this case were in a court of equity, instead of bankruptcy, the district judge could have granted the order at his chambers anywhere in the Eastern District of Virginia. The judicial Code, § 9 (R. S. § 576 (Comp. St. § 976)), provides:
>
> " 'The District Courts, as courts of admiralty and as courts of equity, shall be deemed always open for the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and

directing all interlocutory motions, orders, rules, and other proceedings preparatory to the hearing, upon their merits, of all causes pending therein. Any district judge may, upon reasonable notice to the parties, make, direct and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court.'

"The same provisions are made in the first equity rule.

"The bankruptcy court is open at all times, and section 2 of the Bankruptcy Act (Comp. St. § 9586) invests the District Courts 'with such jurisdiction at law and in equity as well enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms.'

"The federal courts, it is true, must find their jurisdiction in express provisions of federal statutes; but in passing on the legality of the method of exercising the jurisdiction plainly conferred, the statutes should be liberally construed in support of every action of the judge looking to the prevention of delay and the promotion of justice. Sections 13 and 14 of the Judicial Code invest a district judge designated to hold court in another district with full judicial power in that district, but there is nothing in the statutes which gives the least intimation of an intention to take away or suspend any power with which he was invested relating to the business of his own district. No provision is made for another judge, while he is absent, to act in his district in making orders and decrees in bankruptcy matters and to perform other judicial duties. Nothing short of the clearest expression of legislative intention would justify the holding that the Congress intended to put in abeyance the exercise in any district of judicial power at chambers necessary to the promotion of justice because its judge was holding court in another district. We are of the opinion, therefore, that while a district judge is holding court

in another district under statutory authority, he has the power, in his discretion, to hear all matters that he could hear at chambers if he were in his own district; and that the order made by Judge Groner at Parkersburg was valid."

Evidence Introduced by the Libelant.

[Tr. 27].

Libelant's first witness was Carl O. Metcalf, clerk and acting deputy collector of customs in charge of marine documents, who identified the license of the Rethaluleu, Libelant's Exhibit No. 1; the owner's oath and the master's oath, Libelant's Exhibits No. 2 and 3. He stated that there was but one boat registered under the name of the Rethaluleu. He identified a certified copy of the license issued to Ward Daniels, Libelant's Exhibit No. 4. The new owner's oath and the master's oath (continuing McCluskey as master) were received and marked Libelant's Exhibits No. 5 and 6.

He testified on cross-examination that Libelant's Exhibit No. 4, the license for the Rethaluleu issued to Daniels, was issued of record in the customs house upon the recording of a bill of sale from Curwin to Daniels. A bill of sale was introduced and marked Claimant's Exhibit A. This is found on pages 369 to 374 of the transcript.

Libelant's next witness was Newell B. Ruggles. No finding was made as a result of his testimony so his evidence will not be stated.

Libelant next offered in evidence the depositions of Eric Olaf Johnson and Walter Krueger which had been taken on June 5, 1929, pursuant to stipulation, at which

time counsel for Claimant appeared. The depositions appear on pages 280, *et seq.* and 312 *et seq.* of the transcript.

Witness Kruger in his testimony referred to one Tony Cornero. In Kruger's testimony Cornero was placed in Hamburg, Germany at a spirits factory and shipping point. [Tr. 318, 319 and 320.] Cornero superintended the placing of the liquor cargo upon the Przemysl. He accompanied the boat from Hamburg, Germany, out to sea and left on the pilot boat. The Przemsyl came through the Panama Canal into the waters of the Pacific Ocean and off the coast of the state of California. There Cornero again contacted his cargo and the parties in charge of it. [Tr. 321, 322 and 323.]

Liquor was taken from the schooner Przemysl by speed boats and the Rethaluleu assisted in this transshipment. It carried from 300 to 500 cases a trip. [Tr. 317, 338, 340, 347 and 348.]

On September 30, 1928, the L'Aquila and the Przemysl were in contact by means of the Rethaluleu and cargoes of intoxicating liquor were transshipped from the Przemysl to the British ship L'Aquila. During the transshipment the Coast Guard Cutter No. 253 came on the scene. The L'Aquila hoisted a signal. The Rethaluleu came out from behind, where it could view the Coast Guard cutter, and put out to sea under full speed, using the British and German vessels as a protection and screen. The cutter pursued the Rethaluleu. After clearing the British and German ships it fired upon the Rethaluleu repeatedly. The Rethaluleu was by far the speedier boat and escaped apprehension at this time. The incident of this transshipment and chase on September 30, 1928, was duly entered upon the log of the Coast Guard vessel 253 which was introduced in evidence. [Tr. 64.]

The Objection to Admission of Log Books in Evidence

Vessels of the United States over certain tonnage are required to keep log books. The rules of the Life Saving and Revenue Service are made applicable to the United States Coast Guard by Title 14 U. S. C. A., section 38, and regulations of the Revenue Cutter Service (1907 Section 272) are regulations for the keeping of log books, Title 46 U. S. C. A., section 201 (R. S. 4292).

The Coast Guard vessel was thus required by law to keep its log book and having recorded therein the incident of September 30, 1928, mentioning specifically the foreign ships L'Aquila and Przemysl, the Commissioner did not err in admitting this evidence corroborative of the Libelant's deposition witnesses. The evidence is material, pertinent and valuable. It emphasizes the speed of the Rethaluleu and its ability to outdistance the Coast Guard cutter so easily.

Lore and Pavec of the Coast Guard crew were personally produced and related the chase and described the foreign boats. [Tr. 49, 62.] Pavec says the pursued boat was about 55 feet long [Tr. 51] and made 35 or 40 knots an hour. Lore had never before chased a boat as fast as this. [Tr. 75.] Kruger [Tr. 353] ties in the incident by describing the Coast Guard vessel by the "C. G." upon it.

The log of the Coast Guard Harbor Patrol Boat, also called the "Guard Book," under the same theory, was discussed [Tr. 80] and received in evidence [Tr. 254]. This evidence is corroborative of the log of the Coast Guard vessel 253 and of witnesses Kruger and Johnson.

because an examination of it shows that the Rethaluleu was not in the harbor on September 29th and 30th, or October 1, 1928. It dovetails the testimony of Kruger and Johnson as to the number of times the Rethaluleu was out at the Przemysl [Tr. 282 and 317] during August, September and October, 1928.

Deposition witness Kruger is corroborated by witness Dresser [Tr. 91] who found radio equipment aboard the Przemsyl December 3, 1928, and he found none on board in 1927 at New Orleans. Kruger testified [Tr. 318] that the Rethaluleu took a radio receiving and sending set to the Przemysl.

Johnson identified Johnny McCluskey [Tr. 284, 301 and 303]. He saw him on the Rethaluleu twenty or twenty-five times [Tr. 293]. Frank L. Morse recognized his picture [Tr. 166]. Homer H. Evans identified him [Tr. 140].

Evans [Tr. 140] also identified George Garvin as of the crew of the Rethaluleu. This is in accordance with the testimony of Johnson [Tr. 286, 304].

Miss Allman recognized Johnny's picture [Tr. 239] as the man who paid for the repairs on the Rethaluleu and charged the outboard motor to it after it had been seized by the United States Marshal. [Tr. 243.]

Kruger recognized Strallo, alias Cornero [Tr. 327], and George. [Tr. 327.] He identified Johnny McCluskey, also known as Red McCluskey. [Tr. 315 and 316.]

Evans knew McCluskey was master of the boat about the time it was finished. [Tr. 138.] It was licensed July 30, 1928.

The Rethaluleu was found by Boatswain Williams of the Coast Guard coming in from sea August 23, 1928. Johnny McCluskey was in charge. [Tr. 264.]

So we see that all the arguments based on the testimony of Morse, Sr., and Morse, Jr., are vain and ineffectual to controvert the testimony of Kruger, Johnson and Williams. The boat was at sea and used as and when she was needed.

The Przemysl loaded with liquor was off the Coast of California. The Rethaluleu was built to act as a contact boat for her and performed this function so well that at the time the Przemysl went into Ensenada there remained to be disposed of only about 100 cases of liquor. This was tossed into the sea.

Claimant as a Bona Fide Purchaser.

Counsel strenuously argues that Daniels did not know of the unlawful activities of his boat prior to purchase, but to no purpose when we read Claimant's own testimony in answer to his own counsel's questions. [Tr. 191.] From it we must infer his knowledge, as we can clearly read his attitude:

> "Q. Had you any information or did any one intimate to you that this boat which you were buying was a rum runner? A. Well, not that I know of. I wouldn't have paid any attention to it any way. All I asked was a clean bill of sale.
>
> Q. You wouldn't have bought a boat that you knew had been violating the law, would you? A. Really, to tell you the truth I would, as long as I had a clean bill of sale, I didn't care what the boat had done previous to that time if I had a bill of sale, because I didn't know what the boat had ever been used

for or anything else. All I asked was a bill of sale, and I wanted that bill of sale from the Customs Department, which I received."

On cross-examination [Tr. 193]:

"Q. Did Curwin tell you anything about why he wanted to sell the boat? A. Said he needed the money.

Q. Is that all he said? A. About all he said.

Q. Did he say he was in any particular hurry to sell the boat? A. He said he was in a hurry to sell it and was going to sell it in a hurry, and that is why he was putting the price on it which he had on it at that time.

Q. Did he tell you why he was in a hurry? A. No.

Q. Did you do any bargaining, or was that the first figure he placed, $9500? A. We did some bargaining.

Q. What did he ask for it first? A. I don't remember.

Q. Did you pay him cash or check? A. I gave him the cash. He requested it.

Q. He requested that you pay him in cash? A. Yes.

Q. Did you get suspicious of that? A. No, not at all, only to the extent that I said all I asked was just a clean bill of sale.

Q. What did you mean by 'clean bill of sale'? A. Why, that was my way of expressing a bill of sale that is absolutely spotless of anything against the boat."

Claimant Daniels did not recognize the picture of the master of his own boat [Tr. 200]:

"Q. Do you recognize this man here? (Indicating the deposition.)

Mr. Somers: Pointing to Exhibit 1 of the deposition.

A. I don't think so.

Q. Never saw him before? A. I don't think I ever did."

[Tr. 199]:

"Q. Why is it you kept McCluskey on as master of the boat? A. The man I hired wasn't McCluskey.

Q. Your license shows McCluskey as your master. A. The man I hired was McClumskey.

* * * * * * * *

Q. You are sure it wasn't John McCluskey? A. The one I hired is John McClumskey, and his name is on the bill of sale."

[Tr. 201]:

"Q. You saw the signature on the bill of sale? A. Yes.

Q. Will you find it for me? A. There is the signature right there. (Indicating.)

Q. This is the same fellow who went and signed the master's oath, I suppose, at the Customs House? A. Well, they said I had to have some one. I wasn't a licensed pilot.

Q. Did you know McClumskey's signature? A. No, I don't. I didn't know how long he would be with me at that time, just until I got it on the ways, which I thought would only be a matter of a couple of weeks."

Claimant is as indefinite regarding Curwin, "the mysterious stranger" and "the mysterious owner," of the Rethaluleu as he is concerning the man to whom, according to the evidence, he entrusted his $9500 alleged investment. [Tr. 202, 203.]

Earmarks of Illegality and Fraud.

The record in this case cannot be read without the question coming into an impartial mind as to the reason why all the witnesses are vague with respect to Curwin. The contract under which Fellows and Stewart built the boat in the first place was not signed before V. B. Stewart, member of the partnership, but was signed before Homer Evans, a subordinate. It was not witnessed as suggested by the form and a pertinent question is why was it not? The initial payment was made in cash and succeeding payments were in cash. No one at Fellow's and Stewart's Shipyards deemed it expedient or proper procedure to make a memorandum of the residence of J. H. Curwin or make any investigation of his financial ability. Hard money, it is said, bears no earmarks, but its invariable use in alleged ordinary business transactions becomes significant. "The mysterious stranger" paid cash for the boat and paid cash to Morse for the motors. Morse, of course, did not make any more of an investigation than Evans or Stewart did, nor was either able to give a more accurate description than that furnished by Daniels.

The weakness of Claimant's story of his investigation of the qualities of the Rethaluleu is shown by his testimony [Tr. 203]:

> "Q. Did you ask the people at Barbutt & Walsh what they knew about the boat? A. Yes, I was trying to question every one to make sure I was right. I was talking to a number of different ones. In fact, I believe I spoke to Mr. Evans but he doesn't remember that. He said this morning he had never seen me before. When I walked up to him, he didn't know who I was, and talked to him about that boat.

> In fact, when I went and talked to him I didn't know the name of the boat and I pointed it out and he told me it was a 'pip,' and I asked him how fast it was and he said he really didn't know, he thought about 40 miles an hour; and I am just saying that that is the only dope I had on the boat. I went to different ones; then one of the carpenters there, I talked to him, but I didn't talk to any one but one of any trade, because I was only after information for myself."

It appears from the record that Mr. Evans is the building superintendent at Fellows and Stewart and was not employed at Garbutt & Walsh.

Daniels, we remember, was the Pasadena agent of a real estate concern. He does not tell us that he was a director or that he had control of the policies of the Rancho Santa Fe project. He was a real estate salesman and prior thereto had been a salesman of automobiles. He had some familiarity with boats. He had previously owned two. He did not investigate Curwin, he had not met him before. He took his word that he owned the boat, and, if his story is to be believed, he paid $9500 cash on that basis, nor does his childlike credulity stop there. By his own act he retained Johnny McCluskey, and he says it was Johnny McClumskey, as his own and the boat's representative. He did not inquire as to the seamanship or the honesty of McCluskey. He does not tell us what satisfied him in these respects, he did not inquire. McCluskey, under the testimony, operated the boat until seizure, and even thereafter had the audacity to charge to the boat the price of an outboard motor at the shipyard of Garbutt & Walsh. Daniels rode in the boat but once.

In weighing the testimony of Daniels we are justified in considering his business experience. It is unreason-

able that a man with his background would entrust almost $10,000 to "the mysterious stranger" backed only by his word and his signature. Curwin's demand for cash was sufficient to put Daniels on notice that the boat was not "clean."

Daniels produced only one document, his bill of sale, and the Libelant he knew had a copy of that. He offered not a single corroborative circumstance; not a witness to a transaction nor a witness as to his character. Curwin and McCluskey were not produced. Daniels could not be considered in the light of his testimony an innocent purchaser of the Rethaluleu. He took pains not to make the inquiries a reasonable man would in spending a large sum of money. He asked for no certificate of title. He asked for no information at the Customs House. He inquired not as to the reputations nor fitness of property or personality. He shut his eyes saying to himself, "Well, if they question me later I can say 'I didn't know.'"

Title 46, United States Code, Section 325.

The statutes under which forfeiture is sought are statutes respecting the revenue. Title 46, United States Code, Section 325, has been so declared in *Maul v. United States,* 274 U. S. 501. At page 508 the Court stated:

> "One question is whether the vessel's liability to seizure was 'by virtue of any law respecting the revenue.' The liability arose from a violation of §§ 4337 and 4377 of the Revised Statutes—in that the vessel, being enrolled and licensed for the coastwise trade, proceeded on a foreign voyage without giving up her enrollment and license and without being duly registered, and was employed in a trade other than that for which she was licensed. The sections violated are found in a subdivision of the Revised Statutes en-

> titled 'Regulation of Vessels in Domestic Commerce,' but the arrangement of sections in the Revision is without special significance, Rev. Stats. §5600. That subdivision includes several provisions designed to regulate commerce by vessels and also to protect the revenue, these being related subjects. A reading of the sections violated in connection with others in the same subdivision makes it plain that they are directed to the protection of the revenue; and therefore they come within the terms of §3072. That they are also regulations of commerce by vessels does not make then any the less laws respecting the revenue."

Mr. Justice Brandeis in his concurring opinion on page 512, says:

> "Enforcement of the 'laws respecting the revenue' forms only a part of the ocean patrol duties imposed by Congress upon the Coast Guard. And seizure on the high seas of vessels which have 'become liable to seizure' does not exhaust the services required of the Coast Guard to ensure enforcement there of the laws respecting the revenue."

The Supreme Court having found that the statute under discussion is one respecting the revenue should it be given a narrow or a literal construction? This Honorable Court in *C. I. T. Corporation v. United States,* 44 F. (2d) 950, in speaking of a revenue statute, we feel, has answered this question. In this case an appeal was taken from an order of forfeiture and sale of a Graham Truck under the provisions of Section 3453 R. S. (26 U. S. C. A., Section 1185), appellant contending that the evidence was insufficient to justify the judgment for the reason that the truck in question was not within the premises or enclosure within the meaning of the statute imposing forfeiture. The only witness who testified as to the situation at the time of seizure testified that at the time the truck was

seized the rear wheels were just passing through the gate into the yard. In stating the above we have used the words of this Honorable Court found in the statement of fact. The decision goes on as follows:

> "* * * This rule of strict interpretation of statutes declaring forfeiture is not followed in construing the revenue laws of the United States. As was stated by the Supreme Court in U. S. v. Stowell, 133 U. S. 1, 12, 10 S. Ct. 244, 245, 33 L. Ed. 555:
>
> " 'By the now settled doctrine of this court (notwithstanding the opposing dictum of Mr. Justice McLean in United States v. Sugar, 7 Pet. 453, 462, 463 (8 L. Ed. 745),) statutes to prevent frauds upon the revenue are considered as enacted for the public good, and to suppress a public wrong, and therefore, although they impose penalties or forfeitures, not to be construed, like penal laws generally, strictly in favor of the defendant; but they are to be fairly and reasonably construed, so as to carry out the intention of the legislature.' " (Citing cases.)

The Court in the Monte Christo, Federal Case No. 9,719 (17 Federal Cases, 607) had before it the act of December 31, 1792, from which Title 46, United States Code, Section 21, is derived. The charge was that the registration was falsely and fraudulently obtained. The Court stated:

> "In September, 1869, this American register, to the benefit of which the vessel was not entitled, was used by the vessel, with the knowledge of Currier, who took the oath of ownership and dispatched her on a voyage under it. The vessel thereupon became forfeited to the government, by virtue of the statute of December 31, 1792, §27, which declares, 'that if any certificate of registry or record, shall be fraudulently or knowingly used for any ship or vessel, not then actually entitled to the benefit thereof, according to the true intent of this act, such ship or

vessel shall be forfeited to the United States, with her tackle, apparel and furniture.' 1 Stat. 298.

"The forfeiture created by this statute, as well as by the act of July 18, 1866 (14 Stat. 184), under which the evidence also brings this case, is absolute; and in such case it is well settled that the forfeiture, is not defeated by a sale to a *bona fide* purchaser. It is therefore unnecessary to consider the evidence offered to show that the claimant Franklin was a *bona fide* purchaser of the vessel, or to determine whether either he or the master, who has contracted to buy her, are chargeable with knowledge of the fraudulent character of the register under which the vessel has been sailed. There must therefore be a decree condemning the vessel."

It was likewise held in the Dante (17 Fed. (2d) 304) that the want of knowledge of the owner was not a defense to a suit for forfeiture for a violation of this statute. The Court, at page 305, refers to the following:

Esther M. Rendle, 13 F. (2d) 839;

The Underwriter (C. C. A.), 13 F. (2d) 433;

The Resolution, Fed. Cas. No. 11,709;

The Mars (C. C. Mass.), Fed. Cas. No. 15,723;

United States v. One Black Horse (D. C.), 147 F. 770;

U. S. v. One Buick Automobile (D. C.), 300 F. 584;

Goldsmith Grant Company v. United States, 254 U. S. 505, 41 St. Ct. 189, 65 L. Ed. 376;

and remarks that these are persuasive that innocence or want of knowledge of the use to which the offending thing is put "is beside the question" and that by the terms of the statute The Dante became *ipso facto* forfeited upon engaging in illicit traffic.

A sale of the vessel which has violated this statute does not purge the vessel and avoid forfeiture. Honorable Judge J. C. Hutcheson, Jr., of the Southern District of Texas, had occasion to consider this point in the case of *United States v. Gas Screw "Sea Hawk,"* Admiralty No. 1383, decided November 10, 1930. Three grounds of forfeiture were alleged:

> First: That the vessel was altered in form and rigging and that no new license was thereafter procured;
>
> Second: That the vessel smuggled whiskey;
>
> Third: That the vessel was engaged in a trade other than that for which she was licensed.

The Court held that the proof did not support the first ground but that the other two were fully sustained. We quote from the opinion as follows:

> "The point was made that the vessel at the time of her seizure was not engaged in smuggling operations or in violation of the law and the Court could not in this proceedings forfeit her for past offenses. I think the decisions settle the law to the contrary.
>
> "In Wood v. United States, 16 Peters 342, the Court said:
>
> " 'It is of no consequence whatsoever what were the original grounds of the seizure, whether founded or not if the goods were in point of law subject to forfeiture.'
>
> "In the Underwriter, 13 Fed. (2d) 433, it was said:
>
> " 'The learned District Judge was in error in holding that the seizure must be lawful in its origin. The particular method used in bringing the vessel into the district of Connecticut was of no importance, in so far as the jurisdiction is concerned. As it appears that the *res* was in the possession of the col-

lector when the libel was filed, it is sufficient to support the jurisdiction of the libel.' Citing

United States v. Story, 294 Federal 519.

"While in Dodge v. United States, the Supreme Court said:

" 'The jurisdiction of the Court was secure in the fact that the Louise was in the possession of the Prohibition Director when the libel was filed.' 272 U. S. 532.

"While in the Gemma, 13 Fed. (2d) 149, and in Muriel E. Winters, 6 Fed. (2d) 468, forfeitures were entered of vessels in the custody of the Government for causes of forfeiture occurring before and wholly disconnected with the seizure. The jurisdiction of this Court then existing to enforce the title of the Government to the vessel if forfeitable and the facts existing to show that it had become forfeited, the United States should have its decree of condemnation and forfeiture, and it will be so ordered."

The Gemma, 13 Fed. (2d) 149 was affirmed in 16 Fed. (2d) 1016 in an opinion which characterized the objections to the lower court's decree as "without merit and entirely frivolous."

Goldsmith Grant Company v. United States, 254 U. S. 505, also supports Judge Hutcheson's ruling.

By citing cases where the courts have held that a *bona fide* purchaser's rights are forfeited under this statute we do not intend to have the Court believe that Daniels has established himself as such a purchaser. Our contention and the proof, we believe, is to the contrary.

The Circuit Court of Appeals for the First Circuit had occasion to pass upon this statute in *Alksne v. United States,* 39 F. (2d) 62. Certiorari denied, 50 S. Ct. 467.

The errors assigned are set forth in the opinion at page 68. The Court says:

> "The fact that the vessel was engaged in an unlawful trade being found by the court below, and upon evidence which established it beyond preadventure, she became liable to forfeiture under section 4377 of the Revised Statutes of the United States (46 U. S. C. A. §325) for engaging in a trade other than that for which she was licensed.
>
> * * * * * * * *
>
> "And coming down to recent times, since the enactment of the National Prohibition Act (27 U. S. C. A.), this court and the Circuit Courts in the other circuits have repeatedly held that the violation of that Act rendered a vessel liable to forfeiture under section 4377, Rev. St. (46 U. S. C. A. §325), as being engaged in a trade other than that for which she was licensed.
>
> "In The Esther M. Rendle (C. C. A.), 7 F. (2d) 545, 547, the court following the earlier cases said: 'Although the tug was licensed to engage in coastwise trade, its employment in illegal trade or traffic, whether coastwise or foreign, would subject it to forfeiture under Rev. St. §4377 (46 U. S. C. A. §325), as being employed in trade other "than that for which she is licensed."' When this case again came before the court on an amended libel (C. C. A.) 13 F. (2d) 839, the court followed the same rule and ordered the vessel forfeited."

The Court cited the following cases:

The Rosalie M. (C. C. A.), 12 Fed. (2d) 970;

The Underwriter (C. C. A.), 13 F. (2d) 433, 435, affirmed 274 U. S. 501, 47 S. Ct. 735, 71 L. Ed. 1171 (under title Maul v. United States);

The Mineola (C. C. A.), 16 Fed. (2d) 844;

The Dewdrop (C. C. A.), 30 F. (2d) 394:

which were all forfeited upon the same grounds and points out that in *The Underwriter* (*Maul v. United States,* 274 U. S. 501) that it was not suggested by either the counsel or the Court that the vessel was not liable to forfeiture under Section 4377 R. S.

The Court's reference to the Przemysl in the next paragraph is apt for Libelant's purposes (23 F. (2d) 336) although we base no point of law in this case upon that decision.

In reading this last mentioned case we find that this is the occasion upon which Libelant's witness Dresser boarded the Przemysl at New Orleans.

The Judge's decision shows that Anthony Strallo, alias Tony Cornero, was using the Przemysl to carry intoxicating liquor and Kruger, Libelant's witness, similarly testified in the instant case.

In *The Dewdrop, Le Boucf et al. v. United States,* (30 F. (2d) 394), (5th Circuit), in a libel filed under Title 46 United States Code, Section 325, against the vessel licensed for the coasting trade, the Court, under the facts stated in its decision, found for forfeiture, affirming the lower court.

In the *K-3696* (36 F. (2d) 430) the District Court of New York held that that vessel was forfeited for violating this statute.

In the *United States v. Dewey,* 188 U. S. 254, the Supreme Court stated that "cargo is the lading of a ship or vessel."

The Herreshoff, (6 Fed. (2d) 414 at 415), under a kindred statute (R. S. 4214) was forfeited.

"As to the remaining charge, it is contended for the boat that the evidence does not show that she was engaged in the transportation of merchandise for pay. It is true that there is no direct evidence that such was the fact. She had on board, however, more than 400 cases of liquor and wine, and she was only taken after a running fight lasting 20 or 25 miles. It was obviously a commercial undertaking in which she was engaged. There can be no doubt that her service was paid for."

In *The Rosemary,* District Court of New Jersey (23 F. (2d) 103), the motor boat was licensed as a pleasure yacht, was seized with 400 cases of whisky on board and was held subject to foreiture under this statute as engaged in a commercial activity without a license, notwithstanding the claim that the boat was not liable, because not employed in any "trade;" "trade" being defined as occupation, employment or activity. At page 105 the Court stated:

"It appears equally plain to me that the carriage of this large amount of liquor on the Rosemary constituted an activity altogether commercial in its nature, and thus violative of the provisions of section 4214, quite apart from the violation of section 4377, alleged in the libel. And since the commercial transportation of merchandise, be it lawful or contraband, is in the nature of trade, I am able to read in the circumstances of this case a direct violation of the intent of section 4377, and, without any violation to the term 'trade,' a violation of its actual wording as well.

"For, among its other meanings, 'trade' is defined as 'occupation, employment, or activity,' and therefore if the said section in its strict sense provides that "whenever any licensed vessel * * is employed in any other *activity* than that for which she is licensed * * * such vessel * * * shall be forfeited,' it appears to me that the Rosemary has

brought itself as a violator squarely within the scope of this section, and consequently is subject to forfeiture."

In the *Mineola,* (16 F. (2d) 844), the Circuit Court of Appeals for the First Circuit, in considering this statute had before it Claimant's contention that he had no knowledge of the illegal act of his lessee for which forfeiture was sought. The Court held that lack of knowledge upon his part was immaterial and that, although the reason for this holding was not stated, it was because the owner was bound by the acts of the master and crew and cited *Dobbins Distillery v. United States,* 96 U. S. 395.

On March 1, 1809, Congress passed the Non-Intercourse Act which declared that forfeiture followed its violation. This Act was before the Supreme Court in *United States v. 1960 Bags of Coffee,* (12 U. S. (8 Cranch.) 398). The Court stated at page 403:

> "We are of the opinion that the question rests altogether on the wording of the Act of Congress by which it is expressly declared, that the forfeiture shall take place upon the commission of the offense. If the phraseology were such as, in the opinion of the majority of the Court, to admit of doubt, it would then be proper to resort to analogy, and the doctrine of forfeiture at common law, to assist the mind in coming to a conclusion. But from the view in which the subject appears to a majority of the Court, all assistance derivable from that quarter becomes unnecessary.
>
> "It is true, that cases of hardship and even absurdity may be supposed to grow out of this decision, but on the other hand, if, by a sale, it is put in the power of an offender to purge a forfeiture, a state of things not less absured will certainly result from

it. When hardships shall arise, provision is made by law for affording relief, under authority much more competent to decide on such cases, than this Court ever can be. In the eternal struggle that exists between the avarice, enterprise and combinations of individuals, on the one hand, and the power charged with the administration of the laws, on the other, severe laws are rendered necessary to enable the executive to carry into effect the measures of policy adopted by the legislature. To them belongs the right to decide on what event a divesture of right shall take place, whether on the commission of the offense, the seizure, or the condemnation. In this instance, we are of the opinion, that the commission of the offense marks the point of time on which the statutory transfer of right takes place."

On the same subject the Supreme Court in *United States v. Stowell* (133 U. S. 1 at page 16), stated:

"The next question to be determined is from what time the forfeiture takes effect.

"By the settled doctrine of this court, whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act; the right to the property then vests in the United States, although their title is not perfected until judicial condemnation; the forfeiture constitutes a statutory transfer of the right to the United States at the time the offense is committed; and the condemnation, when obtained, relates back to that time, and avoids all intermediate sales and alienations, even to purchasers in good faith."

"The Pilot," 43 Fed. (2d) 491 (Circuit Court of Appeals of the 4th Circuit), contains many of the authorities recited in this brief and emphatically declares that the innocence of the owner of the vessel is not a defense to a forfeiture *in rem* under the Customs and Navigation

Laws and that the right to remit penalties for forfeitures incurred under these statutes rests solely in the executive department of the government.

Claimant's Offer of Proof.

Claimant contended that he was privileged to attempt impeachment of Libelant's deposition witnesses Kruger and Johnson by introducing in this cause the judgment roll and testimony in the cases of the *United States v. "The Seal,"* and *United States v. "A-1817,"* and the testimony of witness Leonard Wood and L. H. Williams and Homer H. Evans taken at those hearings. Objection was made before the Commissioner that Claimant's proffered evidence was on collateral matter and that the judgments and the testimony in those cases were immaterial to the issue at bar. The objection was sustained.

Claimant urged error in the Commissioner's ruling and argued his exceptions before Judge McCormick. Judge McCormick considered the exceptions and, as shown by Conclusions filed September 19, 1930 [Tr. 385], confirmed the Commissioner in his ruling in words as follows:

> "But it is not clear that the Commissioner erred in excluding the proffered evidence. The Commissioner ruled that the proffered matter was collateral to the issue before him and that at best the matter was offered as impeachment of the witnesses Kruger and Johnson, and being impeachment upon collateral matters, it was irrelevant and immaterial to the issue as to the 'Rethaluleu.' There is considerable strength in this position."

This Court in reading the transcript will note that the depositions of Kruger and Johnson were taken upon Stip-

ulation of the parties. Claimant was represented and cross-examined at length. Personal appearance of these witnesses at the trial being thus waived, Claimant was foreclosed from attempting impeachment even upon a material point. It is elementary that before a witness can be impeached, if the impeaching matter is reduced to writing, it must be first shown to the witness and he be allowed to explain or reconcile any inconsistencies.

In *Crocker First Federal Trust Company et al v. United States* (9 C. C. A.), (38 F. (2d) 545), Your Honors had occasion to consider whether or not a witness could be impeached by allowing Defendant's counsel to pursue the avenue of investigation desired. The witness had testified that he purchased liquor at certain premises and that he was alone when he entered the hotel and when he purchased the liquor. He was asked to write upon a piece of paper in order to identify the handwriting in the hotel register. The Court directed counsel to let the witness pick his signature from the book. Objection was made that this was not proper cross-examination and the Court then refused to allow counsel for the Defendant to follow this line of examination. Defendant objected, pointing out that the handwriting would show that the witness had testified falsely. This Court stated at page 547:

> "In view of the evidence, it was certainly proper for the court to require that the witness be shown the hotel register and the disputed signature, or at least an opportunity to identify his handwriting thereon before embarking in an investigation of handwriting. It is required that a witness be shown documents containing statements alleged to conflict with his testimony before he is interrogated thereon

(sections 2052, 2054, California Code of Civil Procedure; People v. Lambert, 120 Cal. 170, 52 P. 307; 40 Cyc. 2732, III), and the hotel register was alleged to be such a document. Moreover the offer was to impeach the witness and a witness cannot be impeached upon an immaterial or collateral matter, particularly when it is first brought on cross-examination. 40 Cyc. 2769. * * * There was no claim here of that broad right of cross-examination but the narrower right of impeachment. * * * The ruling of the trial court was not an abuse of discretion."

Rule to Be Applied.

The Supreme Court of the United States adopted the rule in *Davis v. Schwartz* (155 U. S. 631), that in a case referred to a Master to report the evidence, the facts and his conclusions of law, there is a presumption of correctness as to his findings of fact similar to that in the case of a finding by a referee, the special verdict of a jury, the findings of a Circuit Court in a case tried by the Court under Rev. Stat. §469, or in an admiralty cause appealed to this Court.

The Circuit Court of Appeals in the *North Star*, 151 Federal (168) at page 177, held that the findings of a Commissioner in admiralty on questions of fact depending upon conflicting testimony or the credibility of witnesses should not be disturbed by a court of revision unless clearly erroneous.

The functions of a Commissioner, to whom a matter in admiralty has been referred, * * * are analogous to those of a Master in Chancery.

In *Kimberly v. Arms,* 129 U. S. 512, a reference by consent is distinguished from a reference under the

usual order of the Court. At page 524 Mr. Justice Field stated:

> "A reference by consent of parties, of an entire case for the determination of all its issues, though not strictly a submission of the controversy to arbitration—a proceeding which is governed by special rules—is a submission of the controversy to a tribunal of the parties own selection, to be governed in its conduct by the ordinary rules applicable to the administration of justice in tribunals established by law. Its findings, like those of an independent tribunal, are to be taken as presumptively correct, subject, indeed, to be reviewed under the reservation contained in the consent and order of the court, when there has been manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise."

In the *Chiquita,* 44 F. (2d) 302, at page 303 (9 C. C. A)., this Court stated:

> "In cases such as this the rule is well settled that the findings of a special master, approved by the trial court, will not be set aside or reversed on appeal except for manifest error in the consideration given to the evidence, or in the application of the law."

The testimony taken before the Commissioner fully supported the finding that the Rethaluleu was knowingly and fraudulently licensed. The Commissioner had before him the fact that Tony Cornero, owner of the cargo of the Przemysl, had supervised the loading of the liquor cargo at Hamburg, Germany, in August 1927. The testimony next placed the Przemysl at New Orleans. According to the facts statement of Judge Burns (23 F.

(2d) 336 at page 339) the Przemysl was in the vicinity of New Orleans, Louisiana, on October 28, 1927. Witness Dresser was aboard the Przemysl there. [Tr. 94.] It passed through the Panama Canal in June of 1928 into the Pacific Ocean. Arriving at a position off the Coast of Southern California it was contacted by the Rethaluleu in July, August and September of 1928. [Tr. 281, 282, 287, 289, 290, 292, 316, 347, 348 and 361.] Kruger's and Johnson's testimony show that Cornero contacted the Przemysl on the Rethaluleu and he was in contact with the Przemysl and its cargo many times. He was on the Przemysl on September 30, 1928, and fled on the Rethaluleu when the Coast Guard vessel appeared.

The contract for the building of the Rethaluleu was signed May 16, 1928, and she was licensed in the Customs House July 30, 1928.

Strallo, alias Cornero, did not come from Europe on the Przemysl. He had shipped his cargo and it was necessary that he complete arrangements in the United States for the bringing of his cargo to shore. For this purpose he needed speed boats faster than the vessels of the United States Coast Guard. The evidence shows that he secured a vessel suitable for this purpose.

The United States Commissioner viewed the boat, observed her accommodations, her cargo carrying space, her fuel storage tanks, and taking these into consideration must have concluded that she was built for rum running.

There is not a line of evidence or a suggestion that this boat was ever used for pleasure in the lawful use of that term. If rum running is pleasure there is support

in the evidence that the boat was used according to its license, but this igenuous argument has not been advanced by Claimant.

The fact that in every case where a payment of money was to be made it was made in cash, that no record was left as to who paid it or where the payee lived; Johnny McCluskey and "the mysterious stranger," J. H. Curwin were not produced at any time in this proceeding; the men who built the Rethaluleu are vague in all their references to Strallo alias Cornero; the Rethaluleu was early put upon the Coast Guard's suspected list and a strict surveillance, so far as possible, was kept of her whereabouts from the time she entered the water; Claimant Daniels's halting explanation "That all I wanted was a clean bill of sale," further illuminates this picture.

Curwin is recorded present on only three occasions:

First: The contract for the boat;

Second: The licensing thereafter in the Customs House;

Third: Immediately after the Przemysl was seized and those who were responsible for her activities knew that all boats which had assisted her were subject to seizure, went through a paper transaction with Daniels seeking to absolve the boat from the consequences of her activity.

It is significant that this "good faith" Claimant, Daniels, did not produce a record of his bank account to show that he ever had withdrawn at one time, and particularly on December 5, 1928, $9500 of his funds.

So we say that there is abundant evidence in the record which justified the Commissioner's finding that the

vessel was fraudulently licensed; was conceived for a fraudulent purpose; paid for under circumstances which made it difficult for those who clothed with the power and authority might inquire into its history, and to identify persons, and circumstances, and find the purpose for which she was built.

Examination of incidents and facts preceding a crime is a powerful aid in establishing whether or not a well conceived plan was formulated and executed or whether the act was spontaneous and without preparation. If the Commissioner had held otherwise, we submit, he would have failed to have accredited to the evidence the weight and authority which it carried.

We find in the recent opinion of the District Court of Massachusetts, Civil Number 4379, opinion dated March 23, 1931, in *United States of America v. American Gas Screw "Marge,"* the following expression applicable to this situation:

> "The structure, equipment and history of the boat was such that it taxes one's credulity to believe that it was being used for purposes purely innocent; on the contrary, it is impossible to escape the conviction that the vessel was a rum-runner, masquerading on the high seas as a pleasure vessel,"

and while the following from the opinion concerns the seizure in that case, we complete the quotation of the opinion because it concerns the burden of proof,

> "and when such a vessel is discovered with a quantity of liquor on board, which corresponds in all particulars with that landed on shore in the night time, and this from a boat which, in outline and dimensions, is similar to the 'Marge,' it is enough to throw the burden upon the claimant to show that it was

not the 'Marge' that was engaged in this unlawful enterprise. This burden the claimant has not sustained."

At another point in the same decision the Court states:

"It has been held in this jurisdiction that yacht enrolled as a pleasure vessel, engaged in the transportation of large quantities of liquor, must be presumed to have been engaged in the transportation of merchandise for pay, even though there is no direct evidence that such was the fact. *The Hereshoff,* 6 F. (2d) 414; *Bush v. The Conejo,* 10 F. (2d) 256; see, also, *The Rosemary,* 23 F. (2d) 103."

CONCLUSION.

The Commissioner had an opportunity to observe the witnesses, the right of cross-examination was given and exercised on every occasion by Claimant. Probable cause was found and the duty was placed upon Claimant thereafter to obsolve his vessel, and both lower courts having found that the Claimant failed in this regard, Libelant and Appellee prays that this Court affirm the decree and judgment of condemnation which this vessel so richly deserves.

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